תנהו לפלוני במעמד ג' קנה –

Give it to him; in the presence of all **three, he acquires** it

Overview[1]

תוספות informs us of restrictions and conditions in the rule of מעמ"ש.

אומר רבינו תם דאף על גב דהמוכר שטר חוב לחבירו וחזר ומחלו מחול[2] **-**

The ר"ת states that even though the rule is **that one who sells a note of debt to his friend and then** the seller of the note (the original מלוה) **forgives** the לוה, the loan **is forgiven**. The לוה is not obligated to pay the buyer, nevertheless if the מלוה -

מכר או נתן במתנה במעמד שלשתן אינו יכול למחול[3] **-**

Sold or gave as a gift (this שטר חוב) to someone **במעמ"ש,** the מלוה **cannot forgive** this loan, and the לוה owes the money to the buyer or receiver of this note.

תוספות proves his point:

וכן משמע בפרק ב' דקדושין (דף מח,א) **דקאמר**[4] **במלוה בשטר פליגי בדשמואל**[5] **-**

And so it seems in the second פרק of קדושין מסכת where the גמרא **states that** the ברייתא is discussing **a מלוה בשטר and they are arguing in the** ruling **of שמואל -**

דמאן דאמר מקודשת לית ליה דשמואל ומר אית ליה דשמואל[6] **-**

That the one who maintains she is not מקודשת (the view of ר"מ) **does not agree with שמואל and** the חכמים (who maintain אינה מקודשת) **agree with שמואל.** The גמרא there continues -

ואיבעית אימא כולי עלמא אית להו דשמואל ובאשה סמכה דעתה קמיפלגי -

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[1] See 'Overview' to previous תוספות ד"ה גופא.

[2] ראובן (the מלוה) has in his possession a note from שמעון (the לוה) that he owes ראובן (a hundred dollars). ראובן sells this note to לוי (for less than a hundred dollars) [not in the presence of שמעון] so now שמעון owes לוי (a hundred dollars). Should ראובן be מוחל this loan to שמעון and absolve him from the responsibility to repay, then שמעון does not have to pay לוי (or ראובן). [Elsewhere (see ב"ב קמז,ב תוד"ה המוכר) it is explained that ראובן will have to compensate לוי for the loss he caused him by revoking the loan (there is a discussion whether ראובן has to pay לוי the face value of the note or just compensate him for the amount he paid for the note).]

[3] In this case ראובן sold or gifted the שטר to לוי in the presence of שמעון; telling שמעון that as of now שמעון owes the money to לוי.

[4] The גמרא there (on מז,ב) cites a ברייתא which states that if one is מקדש a woman with a שטר חוב (someone owed the מקדש money which was documented in a שטר, and he gave it to the woman (as כסף קדושין) so now the לוה owes her the money), there is a dispute between ר"מ (who maintains she is מקודשת) and the חכמים (who maintain she is not מקודשת).

[5] This is referring to the ruling of שמואל that המוכר שט"ח לאחרים וחזרו ומחול מחול.

[6] The חכמים agree with שמואל that the מלוה (in this case the מקדש) can be מוחל the לוה the debt, so the woman does not feel she received anything of value (for the מקדש may be מוחל the חוב and she will have received nothing of value), therefore she is not מקודשת, while ר"מ disagrees with שמואל and the מקדש cannot be מוחל the debt, therefore the woman is מקודשת since she received something of value.

And if you want I can say; everyone (ר"מ and the חכמים) **agree with שמואל** (that the מלוה can be מוחל the חוב), but **they are arguing whether the woman trusts** the מקדש -

מאן דאמר מקודשת סבר דסמכה דעתה דלא שביק לדידה ומחיל לאחריני -

ר"מ **who rules מקודשת assumes the she trusts that** the מקדש **will not abandon her and** will therefore not **forgive the other** (the לוה) the loan (while the חכמים do not assume this). תוספות continues with the גמרא there -

וכי קאמר במלוה על פה פליגי[7] בדרב הונא אי קנה במעמד ג' במלוה[8] -

And when the גמרא there **explains** the ברייתא **that regarding an oral loan, they argue in the** ruling of **רב הונא whether מעמ"ש is effective** even **by a loan** or only by a [9]פקדון. This concludes the citation from the גמרא -

משמע דאי אית להו דרב הונא אף במלוה לכולי עלמא מקודשת -

It seems that if they will agree with רב הונא even regarding a loan (that מעמ"ש is effective) then **she will be מקודשת according to all** (ר"מ וחכמים) -

ואי יכול למחול אמאי מקודשת למאן דאית ליה גבי מלוה בשטר דלא סמכה דעתה -

But if the מלוה **can be מוחל** (even by מעמ"ש) **why is she מקודשת according to the** חכמים **who maintain by a מלוה בשטר that** since **she is not סכמה דעתה** she is not מקודשת -

ואמאי לא מסיק[10] ואיבעית אימא כולי עלמא קנה במלוה אפילו מלוה על פה -

So why did not the גמרא **conclude, 'and if I want I can say; that everyone agrees that** מעמ"ש **is effective by a loan** and **even by a מלוה ע"פ,** however ר"מ וחכמים-

ובאשה סמכה דעתה פליגי כדמסיק אדשמואל אמלוה בשטר -

Argue whether אשה סכמה דעתה or not', **just as** the גמרא **concluded regarding שמואל** in a case of **מלוה בשטר -**

אלא משמע דבמעמד שלשתן אינו יכול למחול[11] -

But rather since the גמרא did not conclude in this manner **this indicates that by מעמ"ש** the מלוה **cannot be מוחל!**

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[7] The ברייתא there mentioned an additional case (במלוה דאחרים) in the dispute between ר"מ וחכמים. The גמרא understood that this case is regarding a מלוה ע"פ.

[8] The מקדש transferred the loan to her in the presence of the לוה. ר"מ agrees that מעמ"ש is effective even by a מלוה, therefore she is מקודשת; however the חכמים maintain that מעמ"ש is effective only by a פקדון, but not by a מלוה, therefore she is not מקודשת, for she received nothing.

[9] The גמרא there did not conclude that everyone can agree that מעמ"ש is effective even by a מלוה, but they are arguing whether אשה סמכה דעתה that he will not be מוחל the loan, or not (as it had concluded previously concerning שמואל by a מלוה בשטר).

[10] It is understood however why the גמרא does not answer here that פליגי בדשמואל (if one can be מוחל a מלוה ע"פ if it was transferred במע"ש) as the גמרא answered previously regarding a מלוה בשטר, because in this case there is no מחלוקת (see מהרש"א הארוך as to what the ruling will be in such a case).

[11] Therefore the גמרא could not have said that all agree that מעמ"ש is effective by a מלוה, for why would the חכמים maintain אינה מקודשת, since the מקדש cannot be מוחל the חוב.

תוספות asks:

ואם תאמר בפרק החובל (בבא קמא דף פט,א) גבי היא שחבלה באחרים[12] -

And if you will say; in פרק החובל regarding the case where a married woman **wounded others -**

דפריך ותזבין כתובתה בטובת הנאה[13] ומשני כל לגבי בעלה ודאי מחלה[14] -

Where the גמרא **asks** (why is she פטור); '**but let her sell her כתובה for a טובת הנאה**' (and with this money she will pay the injured person) **and** the גמרא **answers; whenever it has to do with her husband she will surely be מוחל** her husband the כתובה. This concludes the citation from that גמרא, and תוספות asks:

והשתא אכתי תמכור במעמד שלשתן דאז לא תוכל למחול -

But now that there is no מחילה by מעמ"ש, **she can still sell** her **כתובה במעמ"ש, for then she cannot be מוחל** the obligation. She will then pay her victim with this money; why is she פטור?!

תוספות rejects an anticipated solution to this question:

דאף על גב דהבעל ודאי לא יתרצה[15] הא פרישית[16] דאפילו בעל כרחו קני[17] -

For even though the husband will certainly not agree to this arrangement, nevertheless **I have** previously **explained that** מעמ"ש **is effective even against the will** of the debtor. The question remains if מעמ"ש is קונה even בע"כ (of the debtor), why cannot the woman sell her כתובה במע"ש and pay her victim.

תוספות has an additional question:

ועוד[18] גבי שחבלה בבעלה[19] תמכור במעמד ג' דשם יתרצה הבעל כדי לגבות חבלתו -

And furthermore regarding the case of a woman **who wounded her husband,**

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[12] The גמרא there cites the משנה (on פז,א) that if a married woman wounded someone she is exempt from paying (because she has no money of her own [it belongs to her husband]).

[13] Let us assume that the face value of the כתובה is two hundred דינרים, meaning that if her husband divorces her or he predeceases her, she will receive two hundred דינרים. The woman can sell this futures contract and the buyer will pay her for this right to collect the כתובה. The price will be (much) less than two hundred דינרים for maybe the husband will never divorce her and she will predecease him, in which case the buyer of the כתובה will receive nothing. This reduced price which she can receive for selling her כתובה is called טובת הנאה.

[14] See the גמרא and רש"י there ד"ה וחזר that we do not allow her to sell the כתובה because since we are certain that she will be מוחל the כתובה; this will cause the buyer an undue loss.

[15] The husband is not gaining anything by this and he would rather his כתובה be paid to his wife (upon his death) than to a stranger, for then her children (his children) will eventually retain it, but now he is losing it for a low price. [Alternately, he may not want his wife to achieve (any semblance of) financial independence, by her selling the כתובה (מפי ר' פז"ו מרזוב שי').]

[16] See previous תוספות ד"ה גופא.

[17] See מהר"ם שי"ף that בי"ד will force him to be present at the מעמ"ש, in order to pay the victim.

[18] This is a difficulty even if we were to assume that מעמ"ש is effective only with the consent of the debtor (in this case; the husband).

[19] The גמרא there (on פט,ב) cites a ברייתא that if a woman wounded her husband she suffers no loss. עיי"ש.

why is she פטור, **let her sell** her **כתובה במעמ"ש,** and pay her husband, **for in that** case **the husband will agree** to the sale **in order to collect** payment **for his wound** –

תוספות presents a similar difficulty:

וכן בסוף פרק קמא דבבא מציעא (דף יט,ב) **גבי מצא שובר**[20] **-**

And similarly in the end of the first פרק of מסכת ב"מ regarding where one found a receipt of payment for a כתובה -

דפריך בזמן שהאשה מודה אמאי יחזיר לבעל -

Where the גמרא **challenges why is it that when the woman admits** to the validity of the שובר **we return it to the husband -**

ניחוש דלמא כתבה ליתן בניסן ולא נתנה עד תשרי כולי[21] **-**

Let us be concerned that perhaps she wrote the שובר **to give it** to her husband **in ניסן, but she did not give it to him until** the following **תשרי, etc. -**

ומשני שמע מינה איתא לדשמואל[22] **-**

And the גמרא **answers; we derive from this** ruling **that שמואל is correct.** This concludes the citation from that גמרא. Now תוספות concludes his question -

והשתא ניחוש דלמא מכרה במעמד ג' דאינה יכולה למחול –

But let us still be concerned for perhaps she sold the **כתובה במעמ"ש where she cannot be מוחל,** so the buyer knew that his claim cannot be revoked, but by returning this receipt to the husband we are hurting the buyer illegally!

תוספות answers (the last three questions regarding כתובה):

ויש לומר דלא תקינו מעמד ג' בכתובה דאפשר שלא תבא לידי גבייה לעולם[23] **-**

And one can say; that the חכמים **did not institute מעמ"ש by** the sale of **a כתובה, since it is possible that** the כתובה **will never be collected.**[24]

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[20] The גמרא there cites a ברייתא that if someone found a receipt for a כתובה (where the woman acknowledges receiving payment for her כתובה), if the woman admits that she received the payment, we give the receipt to the husband (to keep as proof, so she cannot claim she never received her כתובה payment), if the woman denies receiving payment we do not give the receipt to either party.

[21] ניסן time the husband told her he would pay up her כתובה, provided she writes him a receipt. The woman had a receipt written up dated some time in ניסן. The husband however did not pay her in ניסן, so she kept the receipt. Sometime after ניסן she sold her כתובה to a buyer (and wrote him a note that she sold him the כתובה in תמוז). The husband paid up her כתובה by תשרי time and she gave him the receipt which was dated the previous ניסן. When the buyer of the כתובה approaches the husband to collect the כתובה that he bought, the husband will show that he already paid the כתובה in ניסן (before the buyer bought it in תמוז) and therefore the sale to the buyer is invalid, because there was no longer a כתובה debt. By returning this receipt we are hurting this buyer fraudulently.

[22] שמואל maintains המוכר שט"ח לחבירו וחזר ומחלו מחול. The buyer is not being hurt, for he knew initially that his purchase of the debt can be revoked at any time by the woman (the מלוה in this case). He accepted this risk.

[23] If the husband does not divorce her and she predeceases him, the כתובה remains in the estate of the husband.

תוספות offers an alternate solution regarding the case of the שובר (only):

ועוד יש לומר דהתם גבי שובר אין לחוש כלל דשמא מכרה במעמד שלשתן -

And in addition one can say that there regarding the שובר there is no concern at all that perhaps she sold the כתובה **במעמ"ש** -

דאם אין עדים שמכרה אם כן הבעל והאשה יכפרו המכירה[25] **-**

For if there are no witnesses that she sold the כתובה, **then the husband and wife will deny the sale -**

ואם יש עדים ואומרים שהבעל נתרצה או אפילו שתק ודאי השובר שקר[26] **-**

And if there are witnesses who say that the husband agreed to the sale or even if he was silent and did not protest the sale, then **certainly the שובר is false -**

ואם מיחה אז מוכח שהשובר אמת וליכא למיחש דלמא כתבה ליתן בניסן כולי:

And if the עדים testify that the husband **protested** by the sale and claimed he already paid up the כתובה, then **it is evident that it is a valid שובר and there is no concern that perhaps she wrote** the שובר **to give it in ניסן, etc.**

Summary

One cannot forgive a loan that was transferred במע"ש. There is no תקנה of מעמ"ש by a כתובה.

Thinking it over

1. Why is there this difference that if a שט"ח is sold במעמ"ש the מלוה cannot forgive the loan; however if it is not sold במע"ש, then the מלוה can forgive the loan?[27]

2. What is the logic that there is no מעמ"ש by כתובה since it may not be collected?[28]

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[24] See תוספות ב"ק פט,א ד"ה כל who writes: תירץ ר"י דמעמד שלשתן אין מועיל בכתובה בעודה תחת בעלה כיון דעדיין לא ניתנה לגבות.

[25] The buyer is not losing anything no matter when the שובר was written. It is obvious (since the woman is admitting to receiving payment from her husband) that they are in collusion against this buyer; he has no chance of collecting for they will both deny that any sale took place. [It is important to remember, that there is no buyer before us, we are just concerned about the ramifications of returning the שובר to the husband.]

[26] The שובר is dated ניסן, and the עדים testify the sale took place the following תמוז with the husband agreeing or not protesting the sale; it is obvious that at the point the כתובה was not yet paid and it is a predated שובר and is invalid!

[27] See אמ"ה # 37.

[28] See נח"מ and בל"י אות שיג.